TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 241

DORRIS MOTOR CAR COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 9, 1925

(30,797)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 30, 1925

[fol. 1]

IN THE COURT OF CLAIMS

No. 389—B

DORRIS MOTOR CAR COMPANY

v.

THE UNITED STATES

I. PETITION—Filed November 16, A. D. 1922

To the Honorable the Justices of the Court of Claims:

Your petitioner, the Dorris Motor Car Company, respectfully epresents unto your Honors that it is a corporation engaged in the anufacturing business at St. Louis, Missouri, and was then and here so engaged during the years A. D. 1918 and 1919.

I

Contract

Your petitioner respectfully represents unto your Honors that on r about the 5th day of October, A. D. 1918, it entered into a written ntract with the United States of America, a true copy of which said ntract is annexed hereto and made a part hereof and marked Exibit A for further certainty, wherein and whereby the United States greed to buy and your petitioner agreed to manufacture and sell to ne United States 1,450 Liberty Motor Governors, SH 12, at Twenty-ght Dollars and Ninety Cents ($28.90) each, making a total of Forty-one Thousand Nine Hundred and Five Dollars ($41,905),
[fol. 2] and 1,450 Liberty Motor Petrol Air Pumps, SH 902, at ne sum of Thirty-seven Dollars and Seventy-five cents ($37.75) ach, making a total of Fifty-four Thousand Seven Hundred Thirty-even Dollars and Fifty Cents ($54,737.50), the total consideration or the entire contract being Ninety-six Thousand Six Hundred orty-two Dollars and Fifty Cents ($96,642.50).

II

Readiness to Perform

Your petitioner did deliver to the United States the 1,450 Liberty otor Governors, SH 12, aforesaid, and the United States did accept nd pay the contract price for the same. Your petitioner did proceed rthwith to manufacture for delivery the 1,450 Liberty Motor Petrol ir Pumps, SH 902, called for by the aforesaid contract, and was at l times ready, willing and able to manufacture and deliver the said 450 Liberty Motor Petrol Air Pumps, SH 902, to the United States. our petitioner further represents that by Article 14 of the aforesaid

contract, Exhibit A, it, your petitioner, was entitled to continue for thirty days with the manufacture of the articles contracted for after receipt of notice of termination of the contract, but your petitioner represents that the United States made no attempt to terminate the said contract under said Article 14 thereof, although requested to do so, and your petitioner avers that if the said contract had been terminated by the United States under the terms of said Article 14 thereof, then your petitioner could and would have completed the manufacture and delivery of said 1,450 Liberty Motor Petrol Air Pumps, SH 902, within the said thirty days during which it was entitled to continue production under the terms of said Article 14 of said Exhibit A.

[fol. 3]

III

Work Canceled

Your petition- respectfully represents that on or about the 17th day of December, A. D. 1918 (when the manufacture of the said 1,450 Liberty Motor Petrol Air Pumps, SH. 902, was two-thirds complete) the United States by letter directed your petitioner to suspend pro— under aforesaid contract, and your petitioner complied with the said request. Your petitioner further represents unto your Honors that on or about the 2d day of January, A. D. 1918 your petitioner did offer to resume production and to make and deliver the said 1,450 Liberty Motor Petrol Air Pumps, SH 902, to the United States, but the United States did then wholly refuse to accept and pay for said 1,450 Liberty Motor Petrol Air Pumps, SH 902, to the great damage of your petitioner.

IV

Damages

Your petitioner respectfully represents unto your Honors that the United States did pay to your petitioner the sum of Twenty Thousand Three Hundred Eighty-nine Dollars and Thirty-eight Cents ($20,389.38) by reason of certain expenditures incurred by your petitioner in the performance of the aforesaid contract and in partial settlement of the aforesaid contract, but did refuse to pay the following items claimed by your petitioner, which said items were a total loss [fol. 4] to your petitioner by reason of the breach of the aforesaid contract by the United States:

Loss of profits	$21,147.67
Overhead expense due to cancellation of aforesaid contract	5,035.35
Total loss remaining unpaid by the United States	$26,182.67

Your petitioner further represents that in addition to the above it sustained other losses for which no claim is made.

V

Summary

Your petitioner further shows unto your Honors that it is the sole owner of this claim and the only person interested therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made, and that your petitioner is justly entitled to the amount herein claimed, to wit: Twenty-six Thousand One Hundred Eighty-two Dollars and Sixty-seven Cents ($26,182.67) from the United States after allowing all just credits, deductions and offsets and that your petitioner has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against the said Government.

Dorris Motor Car Company, by G. P. Dorris, President. John E. Hughes, Attorney for Claimant.

[fol. 5] Sworn to by G. P. Dorris. Jurat omitted in printing.

[fol. 6] EXHIBIT TO PETITION

"Copy of Contract Sued On"

War—Ord. P16036-2588Mc. O. O. Pl. Form No. 7

This agreement made this 5th day of October, 1918, between Dorris Motor Car Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri and having an office at Laclede Avenue and Sarah St., St. Louis, Missouri, party of the first part, and the United States of America, Wm. Williams, Lt. Col., Ord. Dept. U. S. A., acting by direction of tthe Chief of Ordnance, United States Army, and under the authority of the Secretary of War, party of the second part,

Witnesseth:

W-ereas a state of war exists between the United States and certain foreign countries, constituting a national emergency, and the usual requirements of advertisement for bids are dispensed with.

Now, therefore, the parties hereto, in consideration of the mutual agreements herein contained have agreed and do hereby agree with each other as follows:

Article 1. Definitions.—Whenever in this contract the words hereinafter enumerated are used, they shall mean what is set opposite them:

Contractor: The party of the first part and its legal representatives, successors and assigns.

Chief of Ordnance: The Chief of Ordnance, the Acting Chief of Ordnance, or any duly authorized representative of either.

Contracting Officer: The officer in whose name this contract i executed, his successor or successors, his or their duly authorize agent or agents, and any one from time to time designated by th Chief of Ordnance to act as Contracting Officer.

Articles: The articles or things to be furnished under this contrac unless some other articles or things are specifically referred to.

Article II. Articles to be Furnished.—Deliveries and prices.— [fol. 7] The contractor shall manufacture for and furnish to th United States the articles hereinbelow described, in the number o amount, at the times and at the prices below stated; said articles t comply strictly with the specifications and drawings annexed o referred to below or in Schedule 1 hereto annexed; the United State shall accept and pay for said articles upon the terms and condition hereinafter set forth. The workmanship and quality of the article shall, in the absence of other provisions, be the best of their respectiv classes and free from latent defects.

Articles:

(A) Fourteen hundred fifty (1,450) Liberty Motor Governors SH 12.

(B) Fourteen hundred fifty (1,450) Liberty Motor Petrol Air Pumps SH 902.

Price:

(A) Twenty-eight and 90/100 dollars ($28.90) each governor. (B) Thirty-seven and 75/100 dollars ($37.75) each pump, or Ninety-six thousand, six hundred forty-two and 50/100 dollars ($96,642.50) for the entire quantity, f. o. b. cars, Contractor's plant, St. Louis, Missouri.

Deliveries:—Deliveries shall be made as follows:

1,450 Governors shall be delivered during October, 1918.
850 Pumps shall be delivered during December, 1918.
600 Pumps shall be delivered during January, 1919.

Complete delivery of the governors shall be made prior to November 1, 1918 and of the pumps prior to February 1, 1919.

War—Ord. O. O. Pl. Form No. 7.

Article III. Specifications.—The specifications and drawings, if any, hereto annexed or herein referred to, are made a part of this contract with like effect as if herein set out in full. In the event, of any, conflict between the contract and the specifications or drawings the provisions of the contract shall govern.

From time to time, by written notice to the Contractor, the Contracting Officer may make changes in the specifications and drawings or supplemental or substituted specifications and drawings. If any such change increases the cost to the Contractor, a fair addition shall [fol. 8] be made to its compensation; but if it reduces such cost a fair

deduction shall be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for additional compensation hereunder shall be allowed, nor shall the compensation be reduced, unless the change has been ordered in writing. For any delay in delivery attributable to such changes, a corresponding extension of time shall be allowed the Contractor.

Article IV. Component Parts to be Furnished by United States.—The United States shall furnish without cost to the Contractor the materials and component parts listed on Schedule 2, in quantities determined by the Chief of Ordnance to be requisite for the performance of this contract. Should the Contractor be delayed in making deliveries of the articles by reason of delays in the furnishing of such materials or component parts by the United States, a corresponding extension of time shall be allowed the Contractor.

In addition to the raw materials and component parts listed on Schedule 2, the United States may from time to time, at its option, furnish to the Contractor other materials and component parts for use in the performance of this contract: Provided, however, That the Contractor has not previously and in good faith contracted for the purchase of such materials or component parts. Unless it is provided in writing that materials and component parts (other than those listed on Schedule 2) are furnished by the United States without charge, the United States shall be credited with the value thereof, f. o. b. Contractor's plant, fixed at the estimated cost of such materials or component parts used in determining the contract price of the articles, the Contractor to pay demurrage, cartage, and switching charges. Payments for the articles shall be reduced accordingly.

All materials and component parts furnished by the United States shall comply with specifications and shall remain the property of the United States. The Contractor shall account for all material and component parts furnished by the United States, the cost of which has not been paid by or deducted from payments made to the Contractor, in finished product, scrap, unused material or otherwise and shall make such disposition thereof as may be ordered in writing by the Chief of Ordnance. Upon final delivery of the articles, and prior to final payment thereof, the Contractor shall deliver to the Chief of [fol. 9] Ordnance a sworn statement, in form satisfactory to him, of the quantity of such unused material or component parts remaining in the Contractor's possession.

Article V. Change in Amounts.—This contract may be considered as completed and so certified by the Chief of Ordnance upon delivery to and acceptance by the United States of the articles, plus or minus 5 per cent thereof. In the former case there shall be a proportionate increase and in the latter case a proportionate decrease in the total amount payable under this contract.

Article VI. Delivery.—The articles shall be suitably packed, boxed and marked by the Contractor at its expense as directed from time to time by the Chief of Ordnance, and shall be delivered by the

Contractor f. o. b. cars at the railroad station nearest to the place of manufacture, unless some other place of delivery is herein specified. The Contractor shall, at the cost of the United States, ship the articles to any point in the United States designated by the Chief of Ordnance.

Article VII. Payment.—The United States shall pay to the Contractor the prices hereinbefore stated for all articles as and when delivered to and accepted by the United States. All payments shall be subject to correction for errors, if any.

Article VIII. Time.—Time is of the essence of this contract. The Contractor shall give the performance hereof preference and priority over any other work except work heretofore given preference or priority by the United States. It shall, from time to time, and whenever requested so to do, furnish the Contracting Officer reports on the progress of the work.

Article IX. Inspection—Rejection.—All materials and component parts unused or in process, the machinery, the equipment and the plant used in the performance of this contract, and the finished articles, shall at all times be subject to inspection by persons designated by the Chief of Ordnance, and the Contractor shall furnish reasonable facilities and assistance for all such inspection and for testing. Whatever of the materials or component parts not furnished by the United States, or of the articles, do not in all respects comply with the requirements of this contract, shall be rejected, and the [fol. 10] decision of the Chief of Ordnance with respect thereto shall be final. The Chief of Ordnance may require the replacement of all rejected materials, component parts, and articles, and the United States may withhold from the payments to be made hereunder an amount sufficient to cover the cost thereof until such replacement. Upon notice from the Contractor that the articles, or any of them, are completed and ready for delivery, final inspection shall be promptly made by the United States.

The process of manufacture shall be at all times subject to the inspection and supervision of the Chief of Ordnance.

Article X. Care of Property.—The Contractor shall use due and proper care to protect all property of the United States in its possession. Such property shall be suitably marked for identification and shall be kept separate and apart from other property.

Article Xa. Eighty Per Cent Clause.—A sum equal to 80% of the actual cost to the Contractor of direct materials, as defined in Ordnance Office pamphlet "Definition of 'Cost' Pertaining to Contracts," dated June 27, 1917, purchased by the Contractor in quantities requisite for the due and timely performance of this contract, and from sources approved by the Chief of Ordnance, will be paid to the Contractor by the United States monthly upon certificate of the inspecting and receiving officer that such materials have been delivered to the Contractor and inspected and approved by the United States. All such material shall, immediately upon coming into the possession of the Contractor, be marked for identification as the

Chief of Ordnance may direct. When any such payment shall have been made by the United States for such materials the ownership of the same shall vest in the United States. The Contractor shall replace either in money or in kind at the option of the United States all materials so owned by the United States which may subsequently develop latent defects, or become spoiled or destroyed through fault of the Contractor while in its possession.

Upon proper certificate of the inspecting and receiving officer of the United States, showing delivery and acceptance of any of the articles, the United States will pay to the Contractor the difference between the contract price for the articles delivered and the total sum theretofore paid to the Contractor on account of such articles.

[fol. 11] Article Xb. Costs under Article XIV shall be determined in accordance with the pamphlet entitled "Definition of 'Cost' Pertaining to Contracts," issued by the Office of the Chief of Ordnance, War Department, dated June 27, 1917, made a part hereof by reference.

Article Xc. All payments by the United States under this Contract will be made through the St. Louis District Ordnance Office.

Article Xd. The Petrol air pumps shall be boxed four (4) in a box.

Article Xe. The following parts are required per Petrol Air Pump unit (Stencil "B"):

Per unit	Part No.	Name
2	S H 900 A ..	Air Pressure Pump Bushing.
1	S H 900 A ..	Air Pressure Pump Pulley.
4	S H 900 C ..	Air Pressure Pump Cylinder.
1	S H 900 D ..	Air Pressure Pump Shaft.
1	S H 903 A ..	Air Pressure Pump Base.
4	S H 901 A ..	Air Pressure Pump Spring.
4	S H 901 D ..	Air Pressure Pump Piston.
4	S H 901 B ..	Air Pressure Pump Check Nut.
2	S H 901 C ..	Air Pressure Pump Bushing.
4	S H 901 E ..	Air Pressure Pump Displacement Plug.
1	S H 901 F ..	Air Pressure Pump Hole Cover.

The following Standard Parts are required per Petrol Air Pump unit. (Stencil "B"):

Standard Parts

8—5/16 x 3/4 cap bolts.
6—3/4 x 3/4 cap bolts.
1—1/2 U. S. standard nut.
1—No. 5 Woodruff key.

Article XI. Storage.—The Contractor shall provide at its plant storage capacity sufficient for the storage of — days' deliveries of articles at the rate of deliveries herein specified. From time to time,

and for so long as the Chief of Ordnance may require, the Contractor [fol. 12] shall safely and adequately store to the extent of such storage capacity any accepted articles which the United States is not ready to have shipped; such storage to be at the risk of the United States but at the cost of the Contractor. By written notice the Chief of Ordnance at any time may require the Contractor promptly to furnish additional storage capacity sufficient to store not more than —days' additional deliveries at said rate. Thereafter from time to time and for so long as the Chief of Ordnance may require, the Contractor shall safely and adequately store any accepted articles to the extent of such additional storage capacity, but at the cost and risk of the United States. The additional storage capacity shall be furnished at the Contractors' plant, if practicable, and when that is not practicable, at a place adjacent to or near the plant. Subject to the approval of the Chief of Ordnance, such place shall be selected by and the arrangements made therefor by the Contractor. If a portion of the land and buildings then belonging to the Contractor be used for such additional storage, the United States will pay to the Contractor a reasonable rental therefor, to be agreed upon, or, in the absence of an agreement, to be fixed by the Chief of Ordnance.

The articles stored under the provisions of this article after final inspection and acceptance shall be paid for as though they had been delivered f. o. b. cars, but the Contractor shall thereafter, upon the request of the United States and at the expense of the United States, transport the articles stored to the nearest point of shipment by railroad, load the same on cars, and ship the same to such point of destination as the Chief of Ordnance may direct. The United States shall pay to the Contractor all expense incurred for transportation of the articles to storage and cost of unloading and reloading cars at place of storage.

Article XII. Excusable Delays.— The Contractor shall not be held responsible for delays in delivery determined by the Chief of Ordnance to be due to delay in inspection, delay in the giving of shipping instructions to the Contractor, explosions, fires, riots, labor strikes, acts of war, acts of God, or to any other causes beyond the control of the Contractor. The Contractor shall use its best efforts to remove such cause of delay as speedily as possible, and immediately upon [fol. 13] the removal thereof shall proceed with the performance of this contract. The time for the making of deliveries shall be extended by the period of such delay, provided application therefor be made in writing within thirty (30) days after the removal of such cause for delay. Where, however, such delays have been substantial and not due to any act or omission of the United States, the Chief of Ordnance shall have the option either to cancel this contract or any of the deliveries that have been delayed upon the terms set forth in Article XIV hereof or to permit the Contractor to proceed with the performance of the contract.

Article XIII. Breach by Contractor.—If the Contractor shall abandon this contract or shall violate any material provision thereof,

or shall fail at any time to prosecute with diligence the manufacture of the articles or the performance of this contract or if this contract shall be assigned, the Chief of Ordnance may, without prejudice to any other rights or remedys or to any claim which the United States may have, terminate this contract by written notice and complete the performance hereof or enter into agreements with other parties for the completion of the performance hereof in whole or part or purchase in the open market or otherwise any articles remaining undelivered hereunder; and the Contractor shall pay to the United States all loss and damage incurred as a result of such action.

Article XIV. Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance may for any of the causes above stated notify the Contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the Contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States [fol. 14] shall also pay to the Contractor the cost of the materials and component parts purchased by the Contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the Contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the Contractor on all obligations incurred necessarily and solely for the performance of this contract of which the Contractor can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labor and service rendered under this contract.

Title to all such materials and component parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

The United States may refuse to make any payment or to reimburse the Contractor for or on account of material or component parts intended to form a part of the articles, whether unused or in the process of manufacture or manufactured, in respect of the delivery of which the Contractor shall be in arrears not due to causes beyond its control at the time of such termination.

Article XV. Precautionary Measures.—In addition to the ordinary precautions heretofore adopted by the Contractor for the guarding

and protection of its plant and work, the Contractor shall provid such additional watchmen and devices for protection of its plan and property and the work in process for the United States agains espionage, acts of war, and of enemy aliens as may be required b the Chief of Ordnance. The Contractor shall, when required, repor to the Chief of Ordnance, the citizenship, country of birth, or alie status of any and all of its employees. When required by the Chie of Ordnance the Contractor shall refuse to employ, or if already em ployed, forthwith discharge from employment and exclude from it works any person or persons designated by the Chief of Ordnanc for cause as undesirable for employment in a plant engaged o work for the United States. The United States shall pay to th Contractor as part of the cost of the articles any expense incurre by the Contractor which shall be determined by the Chief of Ord nance to be directly caused by the requirements of this article.

[fol. 15] Article XVI. Exploitation Forbidden.—The Contracto agrees to refrain from exploiting by publicity or otherwise its products manufactured in pursuance of this contract, and of any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, and its products manufactured under any ar rangements with the United States whatsoever, and the Contractor agrees to refrain from in any way publicly advertising the fact of the manufacture of said product, and to refrain from publishing or caus ing or allowing to be published any photographs, drawings, written or printed matter, or other data disclosing the articles, or parts of the same, or the process of manufacture, or the plans of the government, or any information concerning the same or which shall result in such disclosure. The Contractor agrees to submit to the Chief of Ordnance all pictures or printed matter showing, describing, or in any way relating to the progress of the work to be prosecuted under this contract and under any and all contracts and orders heretofore or hereafter entered into or placed with the Contractor, or under any arrangements with the United States whatsoever, which he may desire to publish, before publishing the same, and the Chief of Ordnance may prohibit such publication. The contractor further agrees to refrain from giving any information whatsoever relative to any experiments that may be carried out by it at the instance of the United States.

Article XVII. Contract not Assignable.—The contractor shall not assign, transfer, or otherwise dispose of this contract or any part thereof without the written consent of the Secretary of War, nor shall it assign any moneys due or to become due hereunder.

Article XVIII. Subcontracts.—The Contractor shall insert in every contract hereafter made in relation to the performance of this contract, a provision that such contract may be assigned by the Contractor and that it relates to this contract. The contractor shall, from time to time, upon request, exhibit to the Contracting Officer any and all contracts made in connection with the performance of this contract.

Article XIX. Waiver of Liens.—The Contractor hereby waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or materials furnished or for any [fol. 16] other reason or cause under this contract, under any lien laws, State or Federal, upon any component parts, materials, supplies, and the like coming into its possession, which it is herein contemplated shall presently or ultimately become the property of the United States, and the Contractor agrees not to create or suffer to be created any mortgage, lien, pledge, attachment, or other encumbrance upon any such component parts, materials, supplies, or other property in its possession intended to form a part of the articles to be delivered under this contract. In the event that such mortgage, pledge, lien, attachment, or encumbrance is created, the Contractor agrees to pay and discharge, or if it disputes the validity of the claim out of which such encumbrance arises, immediately to bond same to the end that all property shall at all times be and remain free from all encumbrances.

Article XX. Disputes.—Except as herein otherwise specifically provided, and doubts or disputes which may arise under this contract or as to its performance or nonperformance shall be referred to the Chief of Ordnance for determination. If the Contractor shall feel aggrieved at his decision, it shall have the right of appeal to the Secretary of War, whose decisions shall be final.

Article XXI. Patents.—The Contractor hereby covenants and agrees to hold and save the United States and all persons acting under them harmless from and against all and every demand or demands of any nature or kind for or on account of the adoption of any plan, model, design, or suggestion or for or on account of the use of any patented invention, article, or appliance that has been or may be adopted or used in or about the construction of said articles, or any part thereof, under this contract, and to protect and discharge the United States from all liability on account thereof or on account of the use thereof, by proper releases from the patentees, and by bond if required, or otherwise, and to the satisfaction of the Chief of Ordnance.

Article XXII. Notice.—Any notice addressed to the Contractor at its principal office and either there delivered or deposited in a postpaid wrapper in any post-office box regularly maintained by the United States, shall be deemed to have been served upon the Contractor. The addresses of the Contractor may be changed at any [fol. 17] time by notice in writing to the Contracting Officer. Nothing herein contained shall preclude service of notices upon the Contractor (1) where it is a corporation by delivery thereof to any of its officers or directors in person; (2) where it is a firm by delivery thereof to one of the partners; (3) where it is an individual by delivery thereof to him in person.

Article XXIII. Officials not to Benefit.—No Member of or Delegate to Congress or Resident Commissioner is or shall be admitted to any

share or part of this contract or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exception of section 116 of the act of Congress approved Mar. 4, 1909 (35 State., 1109).

Article XXIV. Prison Labor.—No person or persons shall be employed in the performance of this contract who are undergoing sentences of imprisonment at hard labor which have been imposed by the courts of the several States, Territories, or municipalities having criminal jurisdiction.

In witness whereof, the parties hereto have caused this contract to be duly executed in triplicate by their respective officers, thereunto duly authorized, the day and year first above written.

Dorris Motor Car Co., by Webster Colburn, First Vice-President, Contractor. United States of America, E. Newman, by Wm. Williams, Lt. Col. Ord. Dept. U. S. A., Contracting Officer.

Witnesses: D. M. McBride.

[fol. 18] Schedule 1 Attached to and a Part of a Certain Contract Between the United States of America and Dorris Motor Car Company and Dated the 5th Day of October, 1918

Each and every of the pamphlets, drawings, specifications, and other papers enumerated is made a part of the schedule and of the contract of which this schedule is a part.

Specifications:

For Item A—Ordnance Office Lubricant Specifications No. 3508, dated May 1, 1918.

Drawings:

For Item A—Ordnance Office Drawing 31-37-12, dated July 25, 1918.

Specifications:

For Item B—Ordnance Office Specifications:

(1) Test.—The pump must be able to produce a maximum pressure of six pounds and a normal pressure of four pounds.

(2) Slushing.—This unit to be thoroughly slushed with War Department lubricant per Ordnance Office Specifications No. 3508, dated May 1, 1918.

Drawings:

For Item B—Ordnance Office Drawings:

31-37-900—Dated August 29, 1918.
901—Dated August 30, 1918.
902—Dated August 30, 1918.
903—Dated August 30, 1918.

[fol. 19] II. Defendant's Answer—Filed Jan. 6, 1923

Comes now the defendant, by its Attorney General, and answering the petition of the claimant herein denies each and every allegation therein contained.

Robert H. Lovett, Assistant Attorney General. M. L. Blake, Attorney.

III. Argument and Submission of Case—Oct. 28, 1924

On October 28, 1924, this case was argued and submitted on merits by Mr. John E. Hughes, for plaintiff, and by Mr. E. S. McCrary, for the defendant.

[fol. 20] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Entered December 1, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

The Dorris Motor Car Company, plaintiff herein, is a corporation under the laws of the State of Missouri. During the years 1918 and 1919 it was engaged in the manufacturing business at St. Louis, Mo.

II

Under date of October 5, 1918, the plaintiff entered into a contract with the defendant, acting by Lieutenant Colonel Williams, of the Ordnance Department, for the manufacture and delivery of 1,450 Liberty motor governors and 1,450 Liberty motor petrol air pumps. The delivery of the 1,450 governors was to be made during October, 1918, 850 pumps were to be delivered in December, 1918, and 600 pumps during January, 1919, the complete delivery of the pumps to be made prior to February 1, 1919. A copy of the said contract is attached to the petition herein and is made a part of these findings

by reference. The contract is on a form printed in the Government Printing Office for the Ordnance Department, known as Form 600-b. The description of the articles to be manufactured and delivered, stated in Article II, was in typewriting. Articles Xa, Xb, Xc, Xd, and Xe are in typewriting. The specifications at the end of the contract were also in typewriting.

III

The 1,450 Liberty motor governors were manufactured and delivered by the plaintiff to the United States and were paid for at the contract price. None of the Liberty motor petrol air pumps was delivered to the United States. Prior to the execution of the contract, and acting under informal orders, the plaintiff proceeded with preparations for the manufacture and delivery of the articles mentioned in the contract.

[fol. 21]

IV

On December 14, 1918, the Ordnance Department requested the plaintiff to suspend operations under said contract. Upon the receipt of this notice to suspend an official of plaintiff, known as the general manager, secretary, and treasurer, was directed by plaintiff's board of directors to discuss the matter with the members of said local claims board. This he did, and a representative of the claims board stated to him that unless the cancellation or suspension was accepted the plaintiff would not get the cooperation of said local claims board toward getting compensation for the work that had been done. This information was carried back to the board of directors and they decided to accept and did agree to the suspension.

On December 17, 1918, the plaintiff notified the Ordnance Department that it would suspend operations in pursuance of the said request therefor. After that date the plaintiff did nothing further toward the completion of the pumps called for by said contract. On December 21, 1918, the Ordnance Department Claims Board, located at St. Louis, and acting under the Ordnance Department, notified the plaintiff of the transmission to it of the outline of method for presenting the claims of contractors, and plaintiff in conjunction with agents of the claims board proceeded to make up and present its claim growing out of said contract to the said district claims board. Prior to December 14 a representative of the plaintiff, acting for it, had a conversation with one of the agents of the War Department, in which plaintiff's representative objected to suspending operations, calling attention to the provision of Article XIV of the contract. This officer insisted that operations should cease, and thereafter plaintiff was notified in writing to suspend operations. The plaintiff suspended operations under said contract on December 17, 1918. The letter requesting plaintiff to suspend operations and the letter of plaintiff stating it would suspend operations under the contract do not appear in the record.

V

The plaintiff's claim as presented to the local board was as follows:

1. Unworked direct material	$6,899.98
2. Worked direct material	3,892.37
3. Direct labor and overhead	3,562.10
4. Other compensation:	
(a) Jones & Lamson lathe	1,065.12
(b) Fitchburg low-swing lathe	1,182.79
(c) Hendy lathe and attachments	1,115.48
(d) Installation of machinery	9.52
(e) Cost of tools, jigs, dies, patterns, etc	2,672.02
(f) Inward handling expense and storage	1,078.24
(g) Overhead for 6 months	5,035.35
(h) Loss due to cancellation	21,147.67

The local claims board approved these items generally, but on sending forward their report and action in the premises to the Ordnance Department for confirmation, it was corrected by the Ordnance Department and returned with the approval of items 1, 2, and 3, and items (a), (b), (c), (d), and (e). In lieu of item (f), amount-[fol. 22] ing to $1,078.24, they allowed items (i), (j), (k), (l), and (m), shown in the exhibit to the agreement of April 19, mentioned in Finding VI and here referred to, amounting to $1,392.55. Item 4 (g), $5,035.35, was disallowed, as was also item (h), "loss due to cancellation." The result was that there was disallowed of plaintiff's claim item (g) for $5,035.35, item (h), loss due to cancellation, $21,147.67, thus making an allowance to plaintiff of $16,279.21, as will more fully appear from the award, a copy of which is attached to the last-named contract, dated April 19, 1919, between plaintiff and the United States, referred to in Finding VI.

VI

After the return by the Ordnance Department to the local claims board of its action on said claim an agreement was made between the plaintiff and the United States, dated the 19th day of April, 1919, a copy of which is as follows:

"Settlement Contract

"Form 2-C

"This contract made this 19th day of April, 1919, between the Dorris Motor Car Company, a corporation organized and existing under and by virtue of the laws of the State of Missouri, and having an office at St. Louis, Missouri, party of the first part (hereinafter called contractor), and the United States of America, by E. S. Ready, major, Ordnance Department, United States Army (hereinafter called contracting officer), acting by direction of the Chief of Ord-

nance, United States Army, and under authority of the Secretary of War, party of the second part:

"Whereas a certain contract was entered into between the United States and the contractor numbered War-Ord-P 16036-2588 ME, dated October 5, 1918 (hereinafter called 'original contract' which term also includes, wherever used herein, all agreements or orders, if any supplementary to said contract, except this agreement); and

"Whereas the furnishing and delivery of further articles under said original contract will exceed the present requirements of the United States; and

"Whereas it is in the public interest to amend said original contract as herein provided and the execution of this supplemental contract is in the financial interests of the United States; and

"Whereas pursuant to the original contract, the contractor, has incurred expenses and obligations for the purpose of furnishing and delivering articles or work remaining undelivered under said original contract; and

"Whereas the contractor is willing to waive any and all rights that it may have under the provisions of the original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination; and

"Whereas it is desirable from time to time to settle and pay certain separate items of expense incurred by the contractor, where such items have been examined and audited by the contracting officer [fol. 23] and found to remain unpaid and to have been properly incurred in the performance of the original contract.

"Now, therefore, in consideration of the promises and of the mutual covenants herein contained, it is agreed between the parties hereto as follows:

"1. This supplemental agreement shall not be taken to cancel or terminate any of the rights or obligations of the parties to said original contract except as herein expressly provided.

"2. This supplemental contract shall operate as an exercise of the termination or cancellation of said original contract provided in the clause thereof relating to termination or cessation of hostilities or termination in the public interest except that the contractor waives any and all rights that it may have under the provisions under the original contract to a specified notice of termination or to continue the performance thereof to any extent, and the contractor shall furnish and deliver and the United States shall accept and pay for no more articles, work, or services, agreed to be delivered or done, whether for product, equipment, or facilities or other purposes under said original contract, except that all articles, work, or services delivered and accepted on or before the date of this supplemental agreement, under and in pursuance of the original contract and not yet paid for, shall be paid for in accordance with the provisions of said original contract, and the contractor will hereafter do no act or thing which will increase the liability of the United States or the amount to be paid by it, and except that there is hereby

reserved to the contractor the right to assert an additional claim against the United States arising out of alleged letters, telegrams, and orders from the United States pertaining to an alleged amendment to the said original contract and which has been known as First Supplemental Contract on amendment to War-Ord.-No. P 16036-2588 ME. The total number of finished units or amount of work delivered and accepted on or before the date of this supplemental agreement and under and in performance of original contract is 1,450 Liberty motor governors SH 12. The total number of Liberty motor petrol air pumps SH 902 called for by the original contract which have been delivered or accepted is none.

"3. The United States shall forthwith pay to the contractor for the items of—

(1) Unworked direct materials	$6,889.98
(2) Worked direct materials	3,892.37
(3) Direct labor and overhead expense	3,562.10
(4) One double spindle	1,065.12
(5) One low swing lathe	1,182.79
(6) Special facilities	1,115.48
(7) Installation of machinery expense	9.52
(8) Cost of tools, jigs, dies, patterns, etc	2,672.02
Total	20,389.38
Less deductions—being the fair value at which the contractor will retain title to scrap from worked materials—$147.19 and worked and unworked materials and equipment and special facilities, $3,962.98, making total deductions	4,110.17
Balance	16,279.21

"which have been examined and found to be due the contractor by the United States the sum of sixteen thousand two hundred seventy-[fol. 24] nine dollars and twenty-one cents ($16,279.21), which payments the contractor hereby agrees to accept in full satisfaction of said items.

"4. The United States shall also pay from time to time in the same manner such other sum or sums as may be found justly due the contractor by the contracting officer for any item or items of expenditure or obligations which have been properly incurred by said contractor for the purpose of performing the original contract. As to each item the payment therefor shall be in full settlement and satisfaction thereof. Where such items or item involve transfer of property, payment shall be made upon the inspection and acceptance of such item or items.

"5. The United States agrees to pay to the contractor such further sum as may be found to be the balance of the total amount justly due to the contractor.

"6. Title to all property specified in Schedule A hereto annexed and made a part hereof which property the contractor expressly warrants to be unencumbered by either the legal or equitable claims, shall vest in the United States, and title to all property specified in Schedule B hereto annexed and made a part hereof shall vest in the contractor immediately upon execution and approval of this agreement. All such property the title to which is to vest in the United States by virtue of payments made hereunder shall in so far as practicable be kept, properly cared for, and marked by the contractor in such manner as the contracting officer may direct. The contractor shall make such disposition of said property for the account of the United States as the contracting officer may direct.

"7. This agreement shall not become a valid and binding obligation of the United States unless and until the approval of the Claims Board of the Ordnance Department has been noted at the end of this instrument.

"In witness whereof the parties hereto have caused this agreement to be duly executed in five parts by their authorized officers as of the day and year first above written.

"Dorris Motor Car Company (Contractor), by Webster Colburn, Vice President. United States of America, by E. S. Ready, Major, Ord. Depart., U. S. A., Contracting Officer. (Seal.)

"Attest: J. F. Culver, Secretary.

"Witnesses: Davis Biggs (For contractor's signature), Josephine Burnes (for contracting officer's signature).

"Approved: Claims Board, by Earle T. Robinson, Captain, Ordnance Department, U. S. A."

[fol. 25] Attached to the last-named contract is the award by the St. Louis District Claims Board as approved as aforesaid, dated April 18, 1919, as follows:

"Award

"St. Louis District Claims Board,
"Dated April 18th, 1919.

"Matter of Partial Settlement of Claim of Dorris Motor Car Company (Constractor). War-Ord.-No. P 16036-2588 ME

"On reading and considering the verified statement of claim and supporting accounts and papers of the above-named contractor submitted herein, dated December 31st, 1918, and on hearing and considering the matter, it is found:

"1. The United States shall forthwith pay to the contractor in partial settlement of its claim the sum of $16,279.21, made up as follows:

Allowances

(1) Unworked direct materials	$6,889.98	
(2) Indirect materials	None	
(3) Worked direct materials	3,892.37	
(4) Direct labor and overhead expense	3,562.10	
(7) Commitments for materials or service	None	
(8) Claims for other compensation:		
a. One double spindle Jones & Lamson lathe	1,065.12	
b. One Fitchburg low swing lathe	1,182.79	
c. One Hendy lathe and attachments	1,115.48	
d. Installation of machinery, expense	9.52	
e. Cost of tools, jigs, dies, patterns, etc.	2,672.02	
Total of contractor's claim		$20,389.38

Deductions

(1) Claims of the United States against the contractor arising out of or incident to the prime contract or for loans in connection therewith	None	
(2) Amount due to the United States, being the fair value of property transferred to the contractor in this settlement	None	
(3) Scrap retained by contractor from worked materials	$147.19	
(4) Allowance to the United States for fair value of property retained by contractor in this settlement	3,962.98	
Total deductions		4,110.17
Balance due contractor		16,279.21

"2. Delays in delivery or performance under the contract to which this award relates have been carefully investigated and it is found that in so far as delayed deliveries may have been accepted they were accepted by the authority of the Secretary of War, and such delays were not due to the fault of the contractor, have resulted in no damage to the United States, have not justified the cancellation of the contract in the interest of the United States, and no deduction should be made from the contractor's compensation because of such delays.

"3. No member of this Ordnance District Claims Board has any interest in this contractor.

[fol. 26] "4. The settlement in accordance with the foregoing findings, subject, however, to the approval of the Ordnance Claims

Board, shall be in full satisfaction of any and all demands or claims in law or in equity which the contractor, its successors, representatives, agents, and assigns, has or may have growing out of or incident to the contract hereinabove mentioned for the items of unworked direct materials, worked direct materials, direct labor and overhead expense, one double spindle, one Fitchburg low swing lathe, one Hendy lathe and attachments, installation of machinery expense, cost of tools, jigs, dies, and patterns, purchased and expended specifically for the above contract and which was on hand at termination of work thereon.

"5. We, the St. Louis Ordnance District Claims Board, have verified and caused to be verified to our satisfaction the contractor's statement of fact as to expenditures made and materials on hand, and do hereby certify that to the extent that the same were allowed by us in the partial settlement as hereinabove stated in detail, such items were verified to our satisfaction. There are no known claims of the United States against the contractor arising out of or incident to the original contract which are not covered in reaching the foregoing determination.

"St. Louis Ordnance District Claims Board, by M. E. Singleton, Chairman.

"We will accept the conclusion and amount stated in the foregoing award.

"Dorris Motor Car Company (Contractor), (Signed) by Webster Coburn."

The item (g) "Overhead for six months," $5,035.35, claimed in the petition, has been abandoned by the plaintiff in this case. It claims that if the contract had been completed it would have made a profit of $21,147.67. This amount was arrived at by taking the total of the amount of 1,450 pumps at $37.75 each, aggregating $54,737.50, and deducting from that sum the amount of material plaintiff had purchased, the labor and overhead that had been expended, and estimated amount of overhead and labor necessary to have completed the work, an item for installing machinery, and the cost for tools, jigs, dies, etc., and a portion of the fixed overhead.

On December 14, 1918, plaintiff was ready, able, and willing to perform the work contemplated by the contract and could have completed the same within thirty days from that date. Upon completion of the work in accordance with the contract its profit would have been $21,147.67. After the receipt of the sum allowed by the claims board and the Ordnance Department plaintiff filed a claim with the Board of Contract Adjustment, organized under the Dent Act. It claimed the item of profits herein asserted and also the item of overhead charge that is abandoned in this suit. The board did not allow either claim, and its action was subsequently approved by the Secretary of War.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

[fol. 27] Judgment is rendered against the plaintiff in favor of United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion—Filed Dec. 1, 1924

Campbell, Chief Justice, delivered the opinion of the court:

The issue between the parties is reduced to the one question of whether plaintiff can recover the profits it could have made if the work called for by the contract had been completed. The contract provided for its termination. It stated that it was necessitated because of war conditions and accordingly made provision for its cancellation. In the case of Russell Motor Car Co., 57 C. Cls. 464, 261 U. S. 514, it appeared that the contract was terminated under the statute of June 15, 1917, and any right to anticipated profits was denied. In the instant case the contract itself makes provision for a cancellation and the controlling principle in the two cases is the same. What should be paid in the event of termination is set forth in Article XIV of the contract, and admittedly all items therein contemplated were paid unless the profits here claimed should also be included. If that item of profits is recoverable, it is difficult to see what benefit accrues from the stipulated right of termination, the plaintiff having been made whole as to all other items growing out of the contract.

The action in terminating the contract should be referred to the powers given in that regard by the terms of the agreement, and, such action being authorized, no presumption is to be indulged that the termination was a breach. But whether the Chief of Ordnance notified the contractor or not that certain of the articles should not be manufactured or delivered is wholly immaterial in view of the fact that plaintiff, when requested to suspend operations, agreed to suspend and did suspend, and the parties proceeded to an ascertainment of the amounts which should be paid plaintiff in accordance with the terms of the contract. This mutual agreement to suspend, followed by an actual suspension, was an effectual waiver of plaintiff's right to proceed. (See Savage Arms Co., 57 C. Cls. 71, 85; affirmed, — U. S. —; decided November 17, 1924.) Not only this, but when the claim of amounts to be allowed was in issue, plaintiff accepted the award of the claims board as approved by the Ordnance Claims Board. It executed a supplemental agreement intended to carry the settlement into effect. Among other recitals of the supplemental agreement is one in which plaintiff waived "any and all rights to a specific notice of termination" or to continue the performance of the original contract to any extent after the re-

ceipt of such notice. It was then paid the sum of $16,279.21, and having received this sum in the circumstances stated, it can not now recover more. (See Savage Case, 92 U. S. 382, 388; Baird Case, 96 U. S. 430; Willard, Sutherland & Co. v. United States, 262 U. S. 489.)

The petition should be dismissed. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 28] V. JUDGMENT OF THE COURT—Entered Dec. 1, 1924

At a Court of Claims held in the City of Washington on the First day of December, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order and adjudge that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Fifty-six dollars and three cents ($56.03), the cost of printing the record in this court, to be collected by the clerk, as provided by law.

By the Court.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT—Dec. 13, 1924

On December 13, 1924, the plaintiff filed a motion for a new trial.

On January 5, 1925, the court handed down the following order on said motion:

Order

It is ordered by the court this 5th day of January, 1925, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 29] VII. PLAINTIFF'S APPLICATION FOR APPEAL—Filed January 8, 1925

The plaintiff, Dorris Motor Car Company, by John E. Hughes, its attorney, makes application to the Honorable Court of Claims for an appeal from the court's decision in the above-entitled cause, decided December 1, 1924, to the Supreme Court of the United States.

John E. Hughes, Attorney for Plaintiff.

Filed January 8, 1925.

VIII. Order of Court Allowing Plaintiff's Application for Appeal—January 8, 1925

It is ordered by the Court this 8th day of January, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 30] Clerk's Certificate

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case; of the findings of fact, conclusion of law and op- of the court by Campbell, Ch. J.; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of January, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,797. Court of Claims. Term No. 241. Dorris Motor Car Company, appellant, vs. The United States. Filed January 9th, 1925. File No. 30,797.